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MOVEMENT IN ATTITUDE AND STRUCTURE FROM THE CODE TO THE MODEL RULES

The past decade has witnessed dramatic change in the regulation of attorney professional conduct. Attorney misconduct is more vigorously disciplined, advertising and solicitation is now generally allowed, and the balance between an attorney's obligations to the court and those to his client has been reassessed. The ABA Model Rules were developed to reflect and implement these changes. This Note compares the Model Code to the Model Rules to assist the practicing attorney to understand the current trends in professional responsibility.

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I. INTRODUCTION

When the ABA Commission on Evaluation of Professional Standards set out to change the Code¹ in the late 1970s, the dominant question was, "Why change the Code at all?"² Now that the proposed final draft of the Rules has been adopted by the American Bar Association,³ a com-

1. Throughout this paper, the MODEL CODE OF PROFESSIONAL RESPONSIBILITY will be referred to as the "Code," and the MODEL RULES OF PROFESSIONAL CONDUCT will be referred to as the "Rules."

2. See A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* (1980), who states, "The most fundamental question for professional ethics is whether those in professional roles require special norms and principles to guide their well-intentioned conduct." *Id.* at 1. See Kaufman, *A Critical First Look at the Model Rules of Professional Conduct*, 66 A.B.A. J. 1074 (1980). "If a new code is adopted by states in a form that resembles the present discussion draft of the Model Rules of Professional Conduct, put forth by the Kutak Commission of the American Bar Association, it will impinge even more substantially on the daily routine of every lawyer's practice." *Id.* at 1075. But see Brown, *What Counsels The Counselor? The Code Of Professional Responsibility's Ethical Considerations—And A Preventive Law Analysis*, 10 VAL. U.L. REV. 453 (1976), who argues that "inadequate recognition is given in the Code to the role of the lawyer as advisor and counselor . . ." *Id.* at 454. *Cf.* Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A. J. 574 (1975). Wolkin states:

The code also exhorts in the first canon that "A lawyer should assist in maintaining the . . . competence of the legal profession," and E.C. 1-2 reads, "the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education." Requiring all lawyers to attend a given number of hours of continuing legal education courses, it is assumed, would fulfill these requirements.

Id. at 575. Wolkin disagrees with the Code position and argues for peer monitoring of lawyer competence instead of mandatory continuing legal education.

3. At the A.B.A.'s annual meeting in August, 1983, the House adopted the final

parison of the Code and the Rules suggests the reasoning behind the revision. The Rules, however, bear a remarkable resemblance in substance to the Code. A comparison of the two documents serves to illustrate what is new, as well as to give support to the change.

The scope of this Note examines the Rules from three different perspectives. These perspectives are theory and structure, developmental process, and substantive rule changes. The discussions from these perspectives intentionally overlap to provide a representative sample of the diverse impact of the Rules. Substantive changes in ethics do not emerge without interaction between lawyers, the public, and the various theories expounded. Reexamination of theory and structure also gives insight into reasons behind the substantive changes evinced in the Rules.

II. THEORY AND STRUCTURE

One element motivating a change from the Code to the Rules is the long-standing tension between morality and ethics. Semantically, morality and ethics are different; when they are treated synonymously confusion and misunderstanding may arise. In a well-known casebook on professional responsibility, the authors use an anecdote to resolve the confusion. For a lawyer, "it is not 'immoral' to list one's speciality on a business card . . . but it may be 'unethical' to do so."⁴ The authors go on to state that "current lawyers' obligations are derived, not from a revealed moral code, but from the traditions of the profession itself."⁵

Semantically and structurally the Rules help resolve the confusion of ethics and morality by eliminating many direct or indirect references to morality. For example, the word "Code" has, arguably, a moral connotation, while the word "Rules" has an ethical one. Codes tend to be

draft of the Model Rules. See *Summary and Analysis, Annual Meeting of the American Bar Association*, 52 U.S.L.W. 2077 (Aug. 9, 1983).

At the earlier mid-year meeting of the A.B.A., the foundation was laid for the Model Rules' final adoption. See *Summary and Analysis, ABA Considers Model Rules and Insanity Defense at Mid-year Meeting*, 51 U.S.L.W. 1121 (Feb. 15, 1983), which states:

Extended sessions, and a leadership that was seemingly determined to bring a six-year project to fruition at the American Bar Association's mid-year meeting, led to major progress on a new code of ethics for the legal profession. The ABA's policymaking house of delegates worked its way through all the black letter rules of the Model Rules of Professional Conduct proposed by the Commission on Evaluation of Professional Standards, the so-called Kutak Commission.

. . . The Rules now go to a drafting committee, which will make only technical changes and will not disturb the substance of the rules as approved. At the annual meeting in August, the House will consider the preamble and the comment sections of the Kutak Commission report, and at that time final action on the Model Rules is expected.

Id. at 1121-22.

4. See T. MORGAN & R. ROTAUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 1 (1976).

5. *Id.* at 2.

generalized and rigid, while Rules tend to describe preferred conduct among a distinct group. Thus, the Rules are directed at "conduct" of lawyers, rather than moralistically at "responsibility."⁶

What are stated, but not necessarily codified, in the Rules are ethics of the legal profession. Ethics, correspondingly, deal with norms, not absolutes.⁷ Thus, when the normative new Rules are popularized as "the good," they are not generally well received.⁸ Yet, a major selling point of the Rules is that they are deliberately designed to be less offensive to morality by focusing upon normative guides, not hortatory precepts. In practical terms, the Rules are an attempt to achieve professional respectability while minimizing prescriptive moral overtones regarding what is "right."⁹

6. The titles of the Code are directed at responsibility, while those in the Rules are directed at conduct. Conduct, typically, can be treated more briefly and concretely, than a description of one's responsibility. A description of conduct is less susceptible to subjective and varied interpretation than the concept of responsibility.

7. Cf. Peter, *Vicarious Morality And The Law*, 14 CREIGHTON L. REV. 1379 (1981), in which the author states:

There is, however, another more primordial view of legal ethics in America, a minority view which now and then tries to gain ascendancy. Its source is David Hoffman's *Course of Legal Studies* (1836) where we read: "My client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go". Here there is a larger role for the lawyer's conscience; here the lawyer is not exclusively the agent of the client's will.

Id. at 1382 (citation omitted).

8. See American College of Trial Lawyers, *Report of the Legal Ethics Committee on the May 30, 1981 Proposed Final Draft of the Model Rules of Professional Conduct*, in I ABA MATERIALS ON MODEL RULES OF PROFESSIONAL CONDUCT, item 503 (1982) [hereinafter cited as ACTL *Legal Ethics Comm. Report*]. "The Committee also believes that the Rules represent a naive and ultimately wrong view of the realities of legal practice. The Rules do not reflect a full understanding of what lawyers do, their roles as advocates, and how that role can best be performed." *Id.* See generally M. GINSBERG, ON JUSTICE IN SOCIETY 213-41 (1965) (relationship of law and morality); Ginsburg, *Essay on Morality and Law*, in 8 ENCYCLOPEDIA BRITANNICA 761 (1972) (societies have reverted to the fusion of spiritual and temporal power by subjection of art, science, the professions and many other areas of human endeavor to direct political control; seeking to regulate all areas of life, they tend to legalize morality and ethics).

9. See Kettlewell, *Keep the Format of the Code of Professional Responsibility*, 67 A.B.A. J. 1628 (1981). Kettlewell states, "The Commission's rules are not even intended to be mandatory. Rather, they are an attempt to incorporate into 'rules' the concepts that are clearly distinguished in the C.P.R. code." *Id.* at 1630; see also Kutak, *The Next Step in Legal Ethics: Some Observations About the Proposed Model Rules of Professional Conduct*, 30 CATH. U.L. REV. 1 (1980). Kutak states that "the proposed Rules are not so much a penal code for the legal profession—although in part they are that—as they are black-letter statements of the practice of ethical lawyering as it is perceived by our profession in the closing decades of the twentieth century." *Id.* at 5-6.

The idea of a professional code of conduct has been disparaged as a short-sighted attempt by puritanical elements of the legal profession to codify morality into mere rules of behavior apart from contextual situations or cultural movement. See ACTL *Legal Ethics*

An examination of both the ABA Code and the Minnesota Code

Comm. Report, supra note 8; see also Frankel, *The Search For Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). Relying heavily upon DR 7-102, Frankel states: "I lean to the view that we can hope to preserve the benefits of a free, skeptical, contentious bar while paying a lesser price in trickery and obfuscation." *Id.* at 1059. But see Freedman, *For a New Rule*, 63 A.B.A. J. 724, 724-25 (1977) (a new Rule is preferable to either a bad rule or no rule); Freedman, *Personal Responsibility In A Professional System*, 27 CATH. U.L. REV. 191, 205 (1978) (those of us who teach law have a primary professional obligation to explicate the moral implications of the law in general and of lawyers' ethics in particular) [hereinafter cited as Freedman, *Personal Responsibility*].

Recently, some writers on theoretical and cultural treatment of morality have recommended introspection and internalization of moral structures, not the imposition of a single framework from a limited perspective. See, e.g., Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979). Shaffer states, "When the Code goes beyond benefit, to aspire to law office decisions which are 'morally just as well as legally permissible', it seems to aspire to a deeper level of interpersonal conversation." *Id.* at 233 (citations omitted).

Increasingly, individuals and groups have been moving toward an understatement of private values and framing silent moralities which both reduce outward tension and stress while enhancing the quality of life on personal and small group levels. At times this trend conflicts with the current Code. See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977). Morgan states:

The very discussion of legal ethics seems to bother many American lawyers. They view a challenge to their ethics as equivalent to a challenge to their honesty and believe that, in the final analysis, ethical judgments involve highly personal, even semi-religious decisions as to what is right and wrong. Historically, however, ethical standards have been seen not as matters of wholly individual judgment but as the best approximations that men and women could devise to govern their conduct in a manner which would allow their society to operate in the fashion that they decided.

Id. at 704; see also Turlington, *Socrates's Courtroom Ethics*, 59 A.B.A. J. 505 (1973). Turlington states:

[T]herein lies the principle on which his ethics in the courtroom were based, that is, that he valued truth above desire for acquittal. Whether one imagines that he had known or believed he was guilty he would have reversed those priorities depends on the degree to which one thinks he was committed to truth.

Id. at 509.

Reflecting the trend toward separation of introspective values from behavioral evaluation in analysis, the Rules, in comparison to the Code, are premised on the individual attorney's internalized standards or morality. See ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARD, *Report to the House of Delegates*, in ABA MATERIALS ON MODEL RULES OF PROFESSIONAL CONDUCT (1982) [hereinafter cited as ABA COMM'N REPORT]. "[T]he law of lawyering depends on self-enforcement of and wide-spread voluntary compliance if its ends are to be met. And the achievement of the voluntary compliance depends, in turn, on the existence of clear, workable rules." *Id.* at 3. The final Rules draft advises:

The primary mechanism for effective self-regulation must be widespread voluntary compliance with the profession's standards of conduct. And widespread voluntary compliance in turn requires clear, workable, common-sense standards by which individual lawyers can regulate their own conduct. The Model Rules provide that kind of standard in an integrated text organized for convenient reference by the lawyer who is not an expert in legal ethics.

Final draft, Model Rules of Professional Conduct, 68 A.B.A. J. 1411 (pull-out supp. at 3, 1982) [hereinafter cited as *Final Draft*].

shows considerable emphasis upon moral absolutes.¹⁰ For instance, the Code can be seen as a set of commandments from which both the Ethical Considerations and the Disciplinary Rules are derived. The commandments are called Canons and are described as axiomatic, but their overall effect is to provide a moral framework that is prescriptive more than descriptive.¹¹

The beauty of the Code, however, is that its precepts are distilled into

10. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980), (a lawyer should avoid even the appearance of professional impropriety); see also Watson, *Canons as Guides to Action: Trustworthy or Treacherous?*, 33 TENN. L. REV. 162, 168 (1966) (canons of ethics are of little specific help in meeting the myriad problems of professional practice); Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C.L. REV. 671, 771-72 (1979) (although the Code specifically prescribes some conduct, other rules are written in such broad, general terms that they fail to intelligibly prescribe any conduct).

11. See Note, *Lawyer Disciplinary Standards: Broad vs. Narrow Proscriptions*, 65 IOWA L. REV. 1386 (1980). The article states:

Absent from the Model Rules are the broad catchall provisions that characterize some portions of the Code. The closest counterpart to DR 1-102, which contains language prohibiting conduct which is "prejudicial to the administration of justice" and which "adversely reflects on [a lawyer's] fitness to practice law," is Rule 10.4(b). . . .

[T]his provision, probably the broadest in the proposed Rules, is substantially less ambiguous than the corresponding provisions of the Code.

Id. at 1409-10; see also Tuoni, *Teaching Ethical Considerations in the Clinical Setting: Professional, Personal and Systematic*, 52 U. COLO. L. REV. 409 (1981).

In recent years, as instruction in legal ethics by means of study of the Code of Professional Responsibility has evolved, criticism has been leveled at teaching methodology focused simply on rote learning of the Canons, Disciplinary Rules and Ethical Considerations of the Code. Inasmuch as examination of the Code leads to the conclusion that the proscriptions contained therein are often ambiguous, . . . perfunctory memorization of such precepts yields little practical guidance.

Id. at 410.

The Ethical Considerations of the current code are defined as aspirational directives, and translate the Canons into a perceived application to a highly idealized institutional practice of law. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1980) ("The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive."); see also Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063 (1978).

As early as when the Canons were first set forth at the beginning of the twentieth century, the practice of law was capable of being framed by elemental constants and established ethical ideals. "The ethical principles . . . are eternal and therefore just as pertinent today as they were more than a century ago. It is in their application to specific cases that the difficulty lies." *Id.* at 1063; see also Wessel, *Institutional Responsibility: Professionalism and Ethics*, 60 NEB. L. REV. 504 (1981). Wessel states:

[I]n the important area of institutional responsibility, we really have not begun to recognize the need for change, much less to attend to it. That need results from the institutional character of modern law practice (exemplified by the large law firm and corporate law department), of modern clients, (such as governments, the great corporations and citizen organizations), and of more of the modern issues, which pose general, public interest, risk/benefit, "quality of life" societal problems rather than the personal, party versus party concerns which predominated at an earlier time.

Disciplinary Rules which became the minimum ethical guidelines for legal practice. As these disciplinary rules set out a practical level of conduct they became descriptive and normative. These ethical guidelines, though, were not completely detached from the prescriptive ideals which they accompanied.¹² Thus, the Code achieved the structure of an ethical document primarily through its Disciplinary Rules.¹³ Further, where the moral precepts of the Code dealt prescriptively with individual liberties,¹⁴ or were procedurally applied to do so,¹⁵ they often clashed with

Id. at 505.

The Ethical Considerations and Canons apparently are attempts to pass on those institutionalized ideals of the past century by fitting the practices and functions of the present legal environment into the old ethical constant and forms. See Carrington, *The Major Problems of the Legal Profession During the Seventies*, 30 SW. L.J. 665, 669-80 (1976); see also J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976). Auerbach states:

Both the Wall Street Lawyer and the Ambulance chaser threatened models of profession independence and esteem associated with a homogeneous society and an arcadian past. . . . The Canons, reflecting values appropriate to a small town, were easily adapted to an equally homogeneous upper class metropolitan constituency, where they served as a club against lawyers whose clients were excluded from that culture: especially the urban poor, new immigrants, and blue collar workers.

Id. at 40-42.

12. See Hazard, *Rules of Legal Ethics: The Drafting Task*, 36 REC. A.B. CITY N.Y. 77 (1981). Hazard states:

[T]he Canons and Ethical Considerations move in opposite directions from the Disciplinary Rules. The Canons and Ethical Considerations posit a high degree of professional punctilio and an integrity befitting an honorable profession. But the Disciplinary Rules refuse to deliver when it gets down to cases. The profession has thus writ for itself a document that gives in the big print and takes away in the small, except that the Code gives in the italics and takes away in the black-letter.

Simply put, the Canons and Ethical Considerations *narrow* the meaning of the black-letter Disciplinary Rules. They do this by preempting any extensive interpretation that the Disciplinary Rules might be given in penumbral areas around the black-letter.

Id. at 87-88 (emphasis original).

13. See *id.* in which Hazard states:

The Code is written as a penal code, and this is a mistake.

In the scheme of the Code, Disciplinary Rules really mean business, i.e., enforcement is contemplated. Hence, the black-letter provisions were called Disciplinary Rules. In this conception, a rule whose enforcement could not be contemplated is not a rule, and therefore must be only an Ethical Consideration or a Canon. All Rules in the Code therefore are in the form of prohibitions, like a penal code.

This approach overlooks that fact that the real legal rules include ones that are not prohibitory. Indeed, many very important legal rules are not prohibitory, but rather are constitutive—"organic" or "empowering." Such rules prescribe ways in which public authority and private endeavors may validly be organized and conducted. For example, the rules of the United States Constitution . . . are mostly constitutive.

Id. at 90.

14. See *Bates v. State Bar*, 433 U.S. 350 (1977) (*a priori* prohibition on advertising of

the Constitution.¹⁶ Those precepts were then eliminated or narrowed by time, place, and manner applications to specific circumstances.¹⁷

Although the Rules represent a significant change from the Code in

typical attorneys fees held in violation of the first amendment to the Constitution); *see also* Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. REV. 922 (1974).

Courts have traditionally disciplined attorneys for out-of-court statements on the grounds that the statements tend to cast disrespect upon the legal system. The Canons and most court decisions thereunder were heirs to this doctrinal straight-jacket. Efforts to protect these statements with the guarantee of free speech embodied in the first amendment were either ignored or rejected by most courts. Recently, however, there has been judicial movement toward the view that the first amendment extends to lawyers and clothes their statements with constitutional protection. Although the new ABA Code of Professional

Responsibility also gives implicit recognition to attorney's first amendment rights, these rights are clouded by extensive restrictions designed to further respect for the legal system and protect the administration of justice. *Id.* at 936.

15. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). (artificial ceiling on attorneys' fees struck down as in violation of Sherman Antitrust Act); *Konigsberg v. State Bar*, 366 U.S. 36 (1961) (refusal to answer questions about memberships and party affiliations not in itself evidence of lack of good moral character for bar admission purposes, but could be basis for exclusion from bar on failure to cooperate with adequate inquiry into moral character); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

16. *See, e.g.*, Comment, *supra* note 10, at 680-81.

State courts had generally assumed disciplinary proceedings to be civil actions until two United States Supreme Court cases in the late 1960's forced a recognition that in at least some respects they are in the nature of criminal proceedings. In *Spevack v. Klein*, the Supreme Court overruled an early decision and held that the fifth amendment privilege against self incrimination is available to lawyers in disbarment proceeding.

Id. Another student author argues that some application of the Code results in denying sixth amendment right to counsel to minorities.

The sixth amendment right to effective counsel demands more than mere competence where first amendment rights are involved. Litigation arising out of political controversy, constituting political expression protected by the first amendment, requires "specialized and courageous legal services as necessary elements of constitutional rights." Denial of admission to the bar and disbarment for association with unpopular controversial groups prevents law students and attorneys from developing the intimate contacts with these groups which effective advocacy requires. . . . Depriving these groups of this type of effective counsel constitutes a denial of access to the legal process more serious than denial of the right to vote since the courts are at least in theory very often the only protectors of minority and unpopular interests.

Comment, *Controlling Lawyers By Bar Associations and Courts*, 5 HARV. C.R.-C.L. L. REV. 301, 333 (1970).

17. *See* AMERICAN BAR FOUNDATION, ANN. C. PROF. RESP., 27-34 (1979) (numerous challenges to Canon 2 and its accompanying EC's and DR's noted and analyzed); *see also* Comment, *supra* note 10.

[V]aguely worded rules may invite state bar associations, or fractions thereof, to weed out attorneys who are unorthodox or politically unpopular by current standards. This has happened in the past, during periods of political dissension and backlash in the bar, and vague requirements such as proof of "good moral character" or lack of "moral turpitude" have provided the vehicle. The presence of standardless rules such as DR 1-102 leaves open the possibility that it could occur again.

Id. at 684-85 (footnotes omitted).

their structure and tone, they may be compared roughly with the Code's disciplinary guidelines for a minimum level of conduct.¹⁸ The Rules, however, have gone much further than the Code by eliminating many of the moral overtones without making massive changes in the Disciplinary Rules. For example, the new Rules have not been set into a backdrop of Canons and Ethical Considerations. Such a change may seem to be only a matter of form, but it has given the Rules the rhetorical respectability of a legislated document.¹⁹ Many of the changes made in disciplinary guidelines even have an empirical basis,²⁰ since applications of the Code and modifications made by different states have provided a practical insight into what is potentially workable in the Rules.²¹

The Rules use descriptive, rather than prescriptive, language and con-

18. See Hazard, *supra* note 12. Hazard also points out that:

In the tripartite division of the Code, the Canons and Ethical Considerations were supposed to be a higher normative level built upon the Disciplinary Rules as a firm legal foundation. On the contrary, they did not turn out that way. The Canons and Ethical Considerations by implication depress the Rules to the lowest level of meaning that their literal words admit.

Id. at 89. See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1980), which states:

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of [a] fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities.

Id.

19. See ABA COMM'N REPORT, *supra* note 9, at 1-5.

20. See *id.* In developing the Model Rules, the Commission had the benefit of extensive comments from hundreds of bar associations and individuals. A list of those who submitted formal comments on the final draft during the past year is found at appendix D of the report. *Id.* at 5-12. A sampling of the comments shows many suggestions made by state representatives on the basis of trial, error, and success. See also *Final Draft*, *supra* note 9. The authors of the final draft state:

As proposed national model standards, the Model Rules, like all model legislation, will be subject to any necessary modification at the level of local implementation. But at the national level, the Model Rules speak from a broader perspective developed during 30 months of public reaction to successive drafts and reflect the leadership which the Association has exercised for some 75 years in recommending national standards of professional responsibility.

Id. at 3.

Professor Morgan gives a section by section synopsis of areas where the ABA Code of Professional Responsibility has inadvertently run into unworkable snags and imbroglios. Areas of reform, foreseen by Professor Morgan, are: ending the monopolization of legal services by lawyers, expanded marketing of legal services, pre-paid legal services, interaction of lawyers and other professions, and increased courtroom candor. See Morgan, *supra* note 9, at 740-43.

21. Compare MINN. C. PROF. RESP. DR 2-101 (1982) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1980). The regulatory "laundry list" of the ABA Code, providing an extensive list of do's and don'ts on attorney advertising, contrasts sharply with the directive approach used in Minnesota, where generally only that advertising which is false or misleading is prohibited. The Model Rules adopt the directive approach.

cepts.²² Under the Code, there is a proliferation of moralistic abstraction in both the Canons and Ethical Considerations. Words such as "integrity," "judgment," "duty," or "propriety" substitute for more specific treatment of normative conduct. In contrast, instead of a division dealing with the "Duty To Make Legal Counsel Available," the Rules set out comparable provisions under the section headings "Information About Legal Services," and "Public Service." The descriptive language facilitates easy access to the provisions and deals with types of actual conduct instead of more diffuse ideas about duty.²³

Extending the theme of linguistic and conceptual precision, the Rules are organized into specific groups that are less likely to overlap. The Rules focus on attorneys' roles and functions which form distinct areas of actual practice.²⁴ Instead of nine Canons, the Rules set out eight non-prescriptive analytical headings. Each heading deals with an attorney role or institutional function of legal practice. The roles delineated are those of advocacy, counseling, and attorney-client relationship, while functions are associating, transacting, serving, and disseminating information. Within each division, there are subdivisions connected by prac-

22. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." These Comments do not add obligations to those in the Rules but provide guidance for practicing in compliance with the Rules.

Final Draft, *supra* note 9, at 4-5 (Preamble). See generally R. LANGACKER, LANGUAGE & ITS STRUCTURE 28-58 (1968). Linguistic work with prescriptive grammar and descriptive rules are limited in their application and do not reflect the accuracy and scope of language as well as transformational (directive) rules. By analogy, descriptive rules may be preferable in legal ethics. See also N. CHOMSKY, SYNTACTIC STRUCTURES (1957). Chomsky shows, in this work on transformational grammar, open-ended possibilities of a descriptive approach to rule structures.

23. See Armstrong, *The Kutak Commission Report: Retrospect and Prospect*, 11 CAP. U.L. REV. 475 (1982). Armstrong states:

Its approach is, as stated in the preamble, that not every situation which a lawyer may encounter can be foreseen, but fundamental ethical principals are always present to guide him. The Model Rules, on the other hand, embody a much greater degree of particularity, in many cases by expanding a general concept stated in the Code by clearly spelling out its implications.

Id. at 491; see also Patterson, *An Analysis of the Proposed Model Rules of Professional Conduct*, 31 MERCER L. REV. 645 (1980). Patterson states:

The evolving distinction between client's law and lawyer's law means that the lawyer must subject the latter to the same analytical scrutiny that he has heretofore given to the former. This process of analysis will pose its own problems because the lawyer will be dealing with ideas which were formerly stated as moral propositions, but have become legal propositions.

Id. at 647.

24. See *Final Draft*, *supra* note 9. The Rules give specific guidance, for example, to law practices concentrating in areas of law that involve counseling (Rules 2.1-2.3), advocacy (Rules 3.1-3.9), corporate work (Rules 5.1-5.4 and Rule 1.13), and public service (Rules 6.1-6.4). See also *Concerns Relating to Particular Areas of Legal Activity* (pt. 2), 51 HENNEPIN LAW., Mar.-Apr. 1982, at 32-62.

tical functional analysis.²⁵

The Code is also logically organized in topical headings. Aspects of the attorney-client relationship, however, are scattered between several headings not clearly devoted to attorney-client issues. Confidences, competence, zeal, fees, and independent judgment are all aspects of the attorney-client relationship covered under various headings in the Code.²⁶ The extensive treatment accorded to the attorney-client relationship in the Code is indicative of its importance to legal ethics. The Rules accentuate the attorney-client relationship by placing it first and by consolidating the various elements of the attorney-client relationship under the attorney-client heading.²⁷

With similar emphasis upon descriptive clarity and analytical organization, the Rules next utilize the roles of the attorney as counselor, advocate, and business person in separate consecutive sections before finally treating professional integrity.²⁸ The drafters of the Rules deliberately treated aspects of legal ethics in order of priority.²⁹ The Rules first set out the way in which the public approaches the attorney, and then consider how attorneys approach the public.³⁰

25. See *Final Draft*, *supra* note 9. The client-lawyer section of the Rules, for example, has distinct sections dealing with competence (Rule 1.1), diligence (Rule 1.3), confidentiality (Rule 1.16), conflicts (Rules 1.7-1.11), and safe keeping of property (Rule 1.15).

26. But see Kettlewell, *supra* note 9, at 1632. Supporting the ideas of the National Organization of Bar Counsel, Kettlewell contends that the Model Rules will have a disruptive impact upon prior uniformity obtained by the Code, case law and scholarly analysis, legal research and indexing, and the familiarity of the public and bar with workable standards.

27. See *Final Draft*, *supra* note 9, at Rules 1.1-1.16 (entitled "Client-Lawyer Relationship").

28. See *id.* at Rules 2.1-2.3 ("Counselor"), Rules 3.1-3.9 ("Advocate"), Rules 4.1-4.4 ("Transaction with Persons Other than Clients"), Rules 5.1-5.4 ("Law Firms and Associations"), Rules 6.1-6.4 ("Public Service"), Rules 7.1-7.5 ("Information About Legal Services"), and Rules 8.1-8.5 ("Maintaining the Integrity of the Legal Profession").

29. See ABA COMM'N REPORT, *supra* note 9. The Report states:

First, there is the question of organization. The basic business of lawyering is done in the context of relationship with clients. Accordingly, the Model Rules first deal with duties arising in the client-lawyer relationship. . . . The Model Rules then address the two primary professional activities undertaken by lawyers: counseling clients and advocacy of clients' causes. . . . The organizational structure of the Model Rules reflects the actual experience of lawyers and contributes significantly to the utility of the Rules as working guides to the law of lawyering.

Id. at 3.

30. See generally Freedman, *Personal Responsibility*, *supra* note 9. Freedman states:

In day-to-day law practice, the most common instances of amoral or immoral conduct by lawyers are those occasions in which we preempt out clients' moral judgments. That occurs in two ways. Most commonly we assume that our function is to maximize the client's position—the client's material or tactical position, that is—in every way that is legally permissible. Since it is our function not to judge the client's cause, but to represent the client's interests, we tend to assume the worst regarding the client's desires. Much less frequently, I believe, a lawyer will decide that a particular course of conduct is morally preferable, even

In the three-tiered structure of axioms, aspirations, and minimum conduct, the Code implies a hierarchy of conduct by attorneys, the lowest of which is still satisfactory for public interaction. By using a single-tier approach, the Rules have, structurally at least, put the client and the attorney on the same level.³¹ Consequently, the Rules implicitly invite the public to participate with the lawyer in creating a satisfactory client-attorney relationship. When a client employs an attorney, the Rules envision that a client-lawyer relationship, not just a attorney-client relationship, is established.³²

The Rules reflect the concern of putting the client first, by reversing the well-known hyphenated pairing of the "attorney-client" relationship. The subheadings continue to reflect the client's perspective after the relationship has begun.³³ For example, often a client considers first whether

though not required legally, and will follow that course on the client's behalf. In either event, the lawyer fails in his or her responsibility to maximize the client's autonomy by providing the client with the fullest advice and counsel, legal and moral, so that the client can make the most informed choice possible.

Id. at 200; see also Kutak, *A Commitment to Clients and the Law*, 68 A.B.A. J. 804, 807 (1982) ("Clients have a right to know the limits of the lawyer-client relationship").

31. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1980) with *Final Draft*, *supra* note 9 (Preamble). The Code has a three-tier structure, based upon axiomatic Canons, aspirational Ethical Considerations, and minimal Disciplinary Rules, in comparison to the single-tier system in the Model Rules. See also Hazard, *supra* note 12, at 77-79 (claims the three-tier structure of the Code is unworkable and should be replaced).

32. The right of the client to control his relationship with his lawyer sometimes is obscured by the attorney's obligations to exercise independent judgment and act as an officer of the court. See generally Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). Professor Fried states:

[I] would like to return to the charge that the morality of role and personal relationship I offer here is almost certain to lead to the diversion of legal services from areas of greatest need. It is just my point, of course, that when we fulfill the office of friend—legal, medical, or friend *tout court*—we do right, and thus it would be a great wrong to place us under a general regime of always doing what will "do the most good." What I affirm, therefore, is the moral liberty of a lawyer to make his life out of what personal scraps and shards of motivation his inclination and

character suggest: idealism, greed, curiosity, love of luxury, love of travel, a need for adventure or repose; only so long as these lead him to give wise and faithful counsel.

Id. at 1088-89. But see Freedman, *Personal Responsibility*, *supra* note 9. Freedman states:

The most serious flaw in Professor Fried's friendship metaphor is that it is misleading when the moral focus is on the point at which the lawyer-client relationship begins. Friendship, like love, seems simply to happen, or to grow, often in stages of which we may not be immediately conscious. Both in fact and in law, however, the relationship of lawyer and client is a contract, which is a significantly different relationship, formed in a significantly different way.

Id. at 198.

33. See, e.g., quotation *supra* note 29; see also *Final Draft*, *supra* note 9. A general overview of the index to the Model Rules shows a sequential development from making a contract with the client, to counseling the client, to eventually advocating the client's cause.

the attorney is competent (Rule 1.1). On the other hand, one of the last things the client considers is whether the attorney is ready to terminate the representation (Rule 1.16).³⁴ Between competence and termination are other client concerns ranging from the scope of employment and fees to confidentiality and conflicts. Only gradually do severe complications find their way into most relationships with an attorney. By turning the attorney-client tables, the Rules make the competent representation of clients a matter of flexibility and imagination, rather than conformity with a condescending attorney perspective.³⁵

The Rules represent an ethical framework constructed on a single plane.³⁶ Both client and attorney participate. No Ethical Considerations encourage the attorney to aspire to a plane of conduct presumed higher than the Disciplinary Rules. As ethical guidelines, the Rules are

34. See *Final Draft*, *supra* note 9, at Rules 1.1-1.16.

35. See Schnapper, *The Myth of Legal Ethics* 64 A.B.A. J. 202 (1978). Schnapper states:

The Code of Professional Responsibility, as the Canons of Professional Ethics before it, is a treasure trove of moral platitudes. If taken seriously, they would steel the most weak-willed lawyer against the daily temptations of his or her profession. The Code enjoins lawyers to assist in maintaining the integrity of the profession, to improve the legal system, to avoid even the appearance of impropriety, to assist the profession in fulfilling its (not his or her?) duty to make legal counsel available, to be "temperate and dignified," to avoid "all illegal and morally reprehensible conduct," to refrain from actions involving "dishonesty, fraud, deceit, or misrepresentation," to encourage and participate in educational programs concerning our legal system, and in general to conduct themselves so as "to inspire the confidence, respect, and trust" of the public.

. . . [But] disciplinary proceedings are almost exclusively limited to three abuses: attorneys who steal the funds of their clients, attorneys who accept fees but fail to pursue their client's cases, and lawyers who commit felonies. . . .

[The] disciplinary actions for any of the other myriad forms of misconduct forbidden by the code are largely unheard of.

Id. at 203.

Significantly, the Model Rules treat professional integrity as a concluding matter, unlike the Code, which puts professional integrity in its first Canon. The difference does not so much denigrate professional integrity as it demonstrates that professional integrity is a result or a product of how attorneys deal with clients and the public, not a mold into which attorneys and the public should be expected to fit before the practice of law can be achieved. See *Final Draft*, *supra* note 9. "The primary mechanism for effective self-regulation must be widespread voluntary compliance with the profession's standards of conduct." *Id.* at 3; see also Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 AM. B. FOUND. RESEARCH J. 159 (A practical look at the need for rules against unauthorized practice). The Rules have eliminated the old negative category of Unauthorized Practice of Law, instead placing it within the category of "Law Firms and Association." See *Final Draft*, *supra* note 9, at Rules 5.3-5.4.

36. A fair study of the Model Rules' confidentiality provisions answers most of another, more generalized criticism—that the Rules are an attack on the adversary system and tilt away from a concern for clients, toward a concern for third parties and society at large. In fact, the Rules work no such shift in the profession's values. But they recognize that the client-lawyer relationship is governed by law to which clients and lawyers alike must conform. It seems the better course for the profession's standards to acknowledge that limitation forthrightly.

ABA COMM'N REPORT, *supra* note 9, at 5.

of a descriptive and normative character, wherein the imperative structure of the standard-setting format is more emphatic than hortatory.³⁷ The Rules are subject and content oriented in describing the norms of the profession and directing lawyers towards those norms in the context of their work.³⁸

When in January of 1980, the ABA Commission on Evaluation of Pro-

37. See *Final Draft*, *supra* note 9. The scope section of the preamble to the proposed Final Draft of the Rules reads in pertinent part:

The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." These Comments do not add obligations to those in the Rules but provide guidance for practicing in compliance with the Rules.

Id., at 4; see also Hazard, *supra* note 12, at 77-97. Hazard strongly emphasizes the need for constitutive language, as opposed to prescriptive language, within the rules of legal ethics.

38. See Patterson, *supra* note 23. Patterson states:

The Model Rules of Professional Conduct are a significant accomplishment in the law of legal ethics. Their major contribution is not that they create new law, but that, perhaps with a little nudge here and a slight shove there, they restate the law as it exists in a form that is more readily accessible and more intelligible to lawyers than rules dispersed throughout the reports.

... Herein lies the real value of the Model Rules. They do in fact provide the lawyer with a framework for reasoned decision.

Id. at 679; see also Kutak, *PostScript: The Model Rules of Professional Conduct*, 11 CAP. U.L. REV. 585 (1982). Kutak summarizes the standards provided by the Model Rules in the following fashion:

—clear, workable *standards* which clarify what are perceived to be the ambiguities in the current Code of Professional Responsibility;

—*standards* which give clear guidance to the lawyer confronted with difficult choices;

—*standards* which address in a meaningful way potential abuses in lawyering; and

—*standards* which will accommodate future developments in the practice of law while preserving the essential values which are inherent in our professional role.

Id. at 592 (emphasis original); see also *Final Draft*, *supra* note 9. To the extent that the Rules deal with morality, rather than ethical norms, they do so by presuming that attorneys will voluntarily introduce their own moral considerations into the context of their practices and clients. In dealing with this voluntary morality, the Rules represent the ethical consciousness of attorneys as a group based upon typical behavior and practical problem solving, not upon an idealized professional conscience.

The Rules are a framework of shared experience and factors which attorneys relate to analytically as well as ethically. Because of this analytical basis, both attorneys and the general public can anticipate and locate behavior performance standards and factors. The stress of the Rules is upon uniformity through voluntary sensitivity to problems rather than upon uniformity through enforcement.

The most significant contribution of the Model Rules may well be that they do move the law of legal ethics forward in providing structure for the private legal process. This is done in two ways. The first is through the delineation and definition of the roles of the lawyer as advisor, negotiator, intermediary, and legal evaluator or auditor, for these are all roles that occur primarily in the private legal process. . . . The second way in which the Model Rules provide structure is by recognizing that the law office is the institution of the private legal process in much the same way that the agency, court, and legislature are the institutions of the public legal processes.

Patterson, *supra* note 23, at 673-74.

Professional Standards released its discussion draft of the Rules, Michael Hoover, the Director of the Minnesota Lawyers Professional Responsibility Board, stated:

The limited article cannot possibly discuss the details of the Model Rules. The Model Rules do, however, contain some radical departures from the current Code and will undoubtedly spark controversy. Greater emphasis is placed upon the lawyer's duty to be candid and fair to the court as opposed to his duty to zealously represent his client. Rules governing solicitation of legal business would be greatly liberalized. Sections dealing with conflicts of interest are expanded. The Model Rules also wrestle with the thorny issues of client perjury, lawyer competence, and the responsibility of senior attorneys to supervise their subordinates.³⁹

A survey of the legal literature reveals that one article cannot comprehensively cover all the issues raised by the Rules.⁴⁰ As the Director also points out, however, the differences between the Rules and the Code are primarily in "emphasis." Subsequent amendments made to the discussion draft, however, eliminate or soften substantive changes once perceived as too "radical."⁴¹ The first portion of this Note attempts to portray the change in emphasis between the Code and Rules.

A review of the final draft of the Rules shows that in most respects the Rules are not substantively different from the Code. Primarily, the Rules are a new approach to presenting legal ethics, needing very little explanatory comment on substantive differences from the Code. While some changes have been extensively debated, and are treated compre-

39. See Hoover, *Lawyer Professional Responsibility*, 36 BENCH & B. MINN., Feb. 1980, at 7. The director provides periodic updates on developments in professional responsibility for the practicing bar in Minnesota; he also supplies informal letter opinions upon request, to a limited extent.

40. See generally *Collected Articles on Professional Responsibility*, 29 EMERY L.J. 886, 889-1027 (1980); *Reflections on a Decade Under the Code of Professional Responsibility*, 57 N.C.L. REV. 495, 497-693 (1979); *Symposium on Proposed New ABA Code*, 54 CONN. B.J. 259, 259-98 (1980); *The Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RESEARCH J. 921. These symposia provide a cross-section of the voluminous material written on the transition from the Code of the Rules.

41. See *Mid-Year Meeting of American Bar Association*, 51 U.S.L.W. 2488 (Feb. 22, 1983). The Commission of Evaluation of Professional Standards has been involved in a tug-of-war with the American College of Trial Lawyers (ACTL) over Rule 1.6, dealing with confidentiality and client information. The trial lawyers perceived the Rules presented in the proposed *Final Draft* of the Model Rule as still too radical, and succeeded in further amending the Rule, winning a favorable vote from the ABA House Delegates at the mid-year conference. Essentially, the amendment eliminates an attorney's option to reveal information to "rectify the consequences of a client's criminal or fraudulent act in furtherance of which the lawyer's services had been used," and thus, limits disclosure to instances involving death and serious bodily injury. The commission incorporated the ACTL amendment in its final draft of the Model Rules, which was subsequently adopted by the ABA at its Annual Meeting in August, 1983. See *Summary and Analysis, Annual Meeting of the American Bar Association*, 50 U.S.L.W. 2077 (Aug. 9, 1983).

hensively in numerous publications,⁴² Robert J. Kutak, former Chairman of the ABA Commission on the Evaluation of Professional Standards, noted the Rules will have very little impact on how Minnesota lawyers practice law.⁴³

III. DEVELOPMENTAL PROCESS

The goal of the Rules is more to regulate attitude than action. The attitudinal approach was developed by persons from a broad social spectrum, including both lawyers and non-lawyers. In 1967, retired Supreme Court Justice Tom C. Clark headed a special ABA committee on enforcement of professional ethical standards. The committee issued a report, known as the *Clark Report*.⁴⁴ The report noted:

Any effort to achieve greater public acceptance of the profession's role in administering discipline must begin by acknowledging reality. The public is aware that lawyers sometimes are guilty of misconduct and, in fact, probably suspects that guilt is far more extensive than it actually is. Efforts to foster public acceptance of a myth that there is no misconduct in the profession are not only useless, but may expose the profession to ridicule as well. The route to encouraging public confidence in the disciplinary process lies in acknowledging the existence of attorney misconduct and in showing the public the steps taken against it.⁴⁵

Since the adoption of the Code in the late 1960's and early 1970's, the legal profession has acknowledged the "reality" of the public's perception by utilizing a newly codified set of provisions.⁴⁶ The Code provisions, however, have not conformed to the "reality" of the actual interplay between the profession and the public.⁴⁷ Code provisions have dealt with the isolated "responsibility" of attorneys more than the ethical conduct

42. See *Symposia* cited *supra* note 40.

43. See Kutak, *The Model Rules of Professional Conduct: A Chairman's Perspective*, 51 HENNEPIN LAW., Mar.-Apr. 1982, at 8 (In the area of advertising and solicitation, for instance, Minnesota law and the Model Rules are, essentially, in accord).

44. See ABA COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (T. Clark chm. 1970).

45. See *id.* at 184.

46. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preface (1980). Since its adoption in 1969, the Code has been amended nine times. The almost continuous revision of the Code during the last decade reflects the rapid transition in thinking about legal ethics that has led to the proposed Model Rules.

47. See Hoover, *Disciplinary Action—Only One Facet of Professional Self-Regulation*, 51 HENNEPIN LAW., Mar.-Apr. 1982 (the marketplace impacts attorneys; indicates bonding of attorneys who handle client finances and continuing legal education improvements are possible alternatives to discipline); Wolfram, *Barriers to Effective Public Participation and Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 641-46 (1978) (suggests federal intervention, voluntary bar associations, and amendments of state constitutions to allow legislative regulation of attorneys).

norms for attorneys interacting with the public.⁴⁸ The Rules are symbolic of the discussions of the problems with the Code and movement towards solutions.

Underlying the discussion and movement is the more esoteric matter of identifying the theoretical basis for rules of ethics, as discussed in the first portion of this Note. Examination of theory also stimulates the process of dealing with the realities of the Rules with greater accuracy, clarity, and practicality. The emphasis of the Rules on normative conduct reflects a preference for the concrete over the abstract. There has also been a movement in substance and process.⁴⁹ For instance, semantic and structural changes facilitate due process because the Rules are more usable in practice. Next, separate treatment in the Rules of various lawyer roles reflects the current trend of lawyers to elaborate the concerns of their specialties.⁵⁰

Experts agree that the basis of ethical provisions for lawyers is in the interaction between the profession and the public.⁵¹ Determining where

48. See Peter, *supra* note 7. See also Note, *supra* note 11, which states that from the perspective of applying the current Code:

[A]ttorney disciplinary boards . . . are claimed to have a representative membership that is able to apply broad standards fairly and will not abuse the disciplinary process. Commentators who criticize both the use of board standards and the functioning of the boards dispute this last contention, however. Rather, they claim that disciplinary bodies over-represent corporate and commercial lawyers and under-represent personal injury lawyers and advocates for the poor, minorities, and politically unpopular groups. Thus, it is contended that the combination of broad standards and disproportionate representation on the disciplinary boards provides the basis for discriminatory exercise of disciplinary power.

Id. at 1400.

49. See Patterson, *supra* note 23. The three basic dimensions of legal ethics problems are rule, client, and process. As Patterson notes:

The most subtle of these dimensions is that of the legal process. The three major legal processes with which the lawyer is most concerned—the administrative, the judicial, and the private legal process—did not develop without reason. Each has its own purposes and fulfills a different function, a factor which suggests that the rights and duties of persons using the processes vary accordingly. . . .

The Model Rules of Professional Conduct reflect the increasing relevance of the legal process in the resolution of ethical issues, but perhaps not as clearly as they could.

Id. at 669-70. At least the Model Rules distinguish between attorney roles, which helps in analyzing the private legal process between client and lawyer.

50. See, e.g., *Concerns Relating to Particular Areas of Legal Activity* (pt. 2), 51 HENNEPIN LAW., Mar.-Apr. 1982, at 32 (practice sections within the bar frequently sensitize themselves to the special problems of legal ethics confronted in their typical cases, with typical clients).

51. See McKay, *Beyond Professional Responsibility*, 10 CAP. U.L. REV. 709 (1981). McKay states:

[T]here are horizons beyond the prescriptions and proscriptions of the Code of Professional Responsibility. The law is a public service profession. American lawyers do not contribute to the gross national product (except technically in

that interaction should be acknowledged, directed, or regulated by a rule, however, is difficult. The difficulty in editing the Rules is eased where they conflict with the United States Constitution. For example, restrictions on attorney advertising that conflicted with the first amendment were changed to conform.

If the Rules are changed only where they conflict with the Constitution, change occurs in a piecemeal fashion and by default; there is no concerted attempt to interact with the public or within the profession to edit the Rules as a whole. A set of ethical rules, like a constitution, must be dealt with as a whole harmonizing its parts with one another rather than merely stating a set of independently valid rules. Format is important to integration. Much attention is given to proper format in the Rules. The Rules' format reflects the background process and procedure matters which put theory into practice.⁵²

As discussed in the prior section, the Rules group analytically related issues under common headings. This organization is a structural improvement that facilitates procedural use of the Rules. Another structural change is the decrease in the sheer volume of language.⁵³ Many of the Code's laundry lists are eliminated and the repeated discussions of issues in several areas of the Code is reduced in the Rules. Instead, cross-

terms of the fees charged); they do not protect the nation's health or safeguard its moral welfare; they do not build or supply. In the absence of those more obvious roles of social utility, the public typically believes that lawyers are responsible for the creation of an adversarial mentality and a society more confrontational than any other social order known to history or the modern world.

Id. at 710. The way in which lawyers are perceived depends upon the initiative they take toward the public.

52. See Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RESEARCH J. 1016. Speaking of the best ways to put theory into practice, Kutak states:

The question is really one of determining the level of generality appropriate to the law that regulates attorney conduct. It is conceivable that a code could be very brief, stating that a lawyer must support the Constitution; maintain the respect due to the courts; maintain only such actions as appear just; employ such means as are consistent with truth; at every peril to himself preserve the secrets of his client; abstain from all offensive behavior; not encourage an action from any corrupt motive or passion; and never reject the cause of the defenseless. However, such generality creates more conflict than it resolves, making compliance as well as enforcement haphazard. On the other hand, it is conceivable that a code could prescribe conduct with the minute detail of the Internal Revenue Code, but such specificity would be burdensome and inhibiting and might have an equally adverse impact on enforcement and compliance.

Id. at 1019. By taking the process of enforcement and compliance into account, the Rules select from both the general and specific treatments defined by Kutak. Compare e.g., *Final Draft*, *supra* note 9, at Rule 1.1 ("Competence") with *id.*, Rule 1.5 ("Fees") (treatment moves, respectively from the general to the specific in this instance).

53. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1980) with *Final Draft*, *supra* note 9, at Rule 7.2 (the Code's laundry list of permitted advertising means is dropped from the Rules).

references are provided in the commentary.⁵⁴

The shift in the Rules to language of descriptive norms analytically organized also makes the Rules more useful than the Code. The Rules are better outlined and indexed. Equally important, economy of language reduces ambiguity.⁵⁵ In Canon 7 of the Code, for example, covering zealous representation of a client, an aspect of zeal is treated by the Canon itself and twice more by an Ethical Consideration and Disciplinary Rule.⁵⁶ Although the Disciplinary Rule is the only one of the three with declared enforcement value, courts frequently resort to an Ethical Consideration for disciplinary emphasis as an unstated enforcement alternative to the Disciplinary Rule.⁵⁷ By this mechanism, an attorney might be held, or hold herself, to a standard of conduct not clearly presented in the Code. Such erratic enforcement diverts attention from the Code to the tribunal. It reduces predictability and squelches creative application of the Code by attorneys.⁵⁸

Under the Rules, on the other hand, all the behavioral guidelines are delineated in one place. An attorney need not look to both an Ethical

54. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DRs 7-101 to 7-110 (1980) with *Final Draft*, *supra* note 9, at Rules 3.1-3.9. What the Code treats under "Zeal" is treated with fewer words than in the Rules under "Advocate."

55. See Note, *supra* note 11, which states: "Opponents of broad standards do not dispute the need for effective disciplinary tools, but they argue that the ethical considerations should not be the basis for discipline, because such broad standards do not provide adequate notice of prohibited behavior and are susceptible to abuse." *Id.* at 1400.

56. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980); see also Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571 (1982). Hazard states:

What has happened is that the Canons and the Ethical Considerations—although supposed to be only aspirational—have been relied on by courts and disciplinary committees as though they were black letter rules. This reliance has occurred in disciplinary proceedings and in other contexts such as malpractice suits against lawyers and motions to disqualify on the ground of conflict of interest. The result is that the present Code has come to contain at least two potential rules governing the same lawyer conduct (and sometimes three potential rules). . . . [An] example is the standard for avoiding conflicts of interest—the circumstances in which a lawyer must decline a new matter because of previous representation of another client. Under DR 5-105(A), the lawyer may accept the new matter unless "his professional judgement . . . reasonably may be affected" On the other hand, there are holdings that the proper standard is Canon 9, so that a lawyer may not accept a new matter if it will involve "the appearance of impropriety."

Id. at 573.

57. See Hazard, *supra* note 56.

58. See Schnapper, *supra* note 35. Schnapper states:

Enforcement becomes inappropriate when we are unable to formulate a reasonably specific rule, when detection of the violation involves an unacceptably high degree of subjectivity, when all available sanctions are excessive, or when the subject matter is one of such sensitivity that fear of sanctions may deter proper or even laudable conduct.

Id. at 204.

Consideration and a Disciplinary Rule, but only to the pertinent Rule.⁵⁹ Further, the Rules attempt to empirically set forth the law. The Rules are guidelines that reflect well-respected norms of the substantive law.⁶⁰ The Rules describe preferred actual conduct more than they provide prescriptive commands.⁶¹ The difference is in the attitude of voluntary compliance adopted by the Rules that is not premised upon reforming attorney behavior. Both the public and the attorney benefit because the public is less likely to perceive the Rules as tough talk with little action.⁶² The Rules' language reflects normative conduct more than it demands compliance with concepts.⁶³

Because the Rules represent the best practical and theoretical principles that have evolved to date, they represent a restatement of the law

59. See *Final Draft*, *supra* note 9. "The Model Rules provide . . . an integrated text organized for convenient reference by the lawyer who is not an expert in legal ethics." *Id.* at 3.

60. See ABA, *Report On Commission On Evaluation Of Professional Standards*, (1979), quoted in Armstrong, *supra* note 23. The Report states:

Our group's evaluation of professional standards has led to the conclusion that a reformation to [sic] writing, the Commission has found a restatement format to be most useful. That format, briefly, consists of the initial statement of normative rules followed by expository, elaborating commentary and, where appropriate, supporting authority and citations to sources.

Id. at 488.

61. See *First Draft*, *supra* note 9 (Preamble). "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." *Id.* at 1143.

62. See McKay, *supra* note 51. McKay states:

Sometimes it is asserted that the legal profession is not concerned with the representation of individual, corporate and public clients. It is said, not without justification, that lawyers have fashioned the rules of self-regulation with their own interests firmly in mind. Certainly, the restrictions against the unauthorized practice of law are helpful to lawyers, and some of the most prominent exceptions to the general rule of confidentiality in attorney-client relationships have been in vindication of the lawyer's right to reveal client confidences in the event of a dispute between lawyer and client.

Id. at 716; see also Schnapper, *supra* note 35. Schnapper states: "The Code sets wondrous standards beyond the reach of most mortals. As enforced, it is intended solely, and somewhat erratically, to protect the few individuals rich enough to hire a lawyer from misconduct, although not from incompetence." *Id.* at 203.

63. See Patterson, *supra* note 23. Patterson states:

[T]he Model Rules reflect what most lawyers would want to do in the situations to which they are directed; but there is a psychological problem here. It is natural to resent a rule prescribing one's conduct, for a rule of conduct, no matter how good, is a restriction on one's freedom of action. . . .

The problem here is primarily one of perception. If one perceives the rules of legal ethics as rigid mandates, the problem is real; if one perceives them as providing a framework for reasoned decision, the problem becomes illusory. Herein lies the real value of the Model Rules. They do in fact provide the lawyer with a framework for reasoned decision. For the Rules provide flexibility for the lawyer by making distinctions based on the nature of the client, defining the roles of the lawyer, and to a lesser extent, recognizing the relevance of the legal process to the resolution of ethical issues.

Id. at 679-80; see also *id.* at 669-70 (Patterson's conception of legal process).

more closely than does the Code. Indeed, the drafters of the Rules elected to utilize the restatement format of rules, commentary and digested application in an attempt to give the Rules new clarity and accessibility. Application of the restatement format, a highly respected arrangement used in other areas of substantive law, facilitates accessibility of the Rules. The restatement format also gives attorneys a better opportunity to compare a Rule with digested trends and jurisdictional treatment. Ideally, the Rules format will present a compendium of cases and commentary providing greater specificity and focus for the treatment of ethical issues. The format itself invites attorneys and judges to scrutinize majority rules and participate in the evolutionary process of improving the ethical rules and the professional's ethical conduct.⁶⁴ As with restatements generally, the Rules must constantly be revised to reflect changes in law and culture within which they interact.

IV. SUBSTANTIVE RULE CHANGES

An overview of the substantive changes in the Rules helps to analyze the differences between the Rules and the Code. Importantly, however, the drafters of the Rules did not deviate greatly from current norms and trends already widely noted and adopted. Rather, the Rules restate the law with a clarity that promotes utility and due process. Substantive changes were made, however, in the areas of confidentiality,⁶⁵ courtroom candor,⁶⁶ fee agreements,⁶⁷ corporate and political practice,⁶⁸ attorney advertising,⁶⁹ and conflicts of interest.⁷⁰ New points of emphasis in each

64. See ABA COMM'N REPORT, *supra* note 9. The Report states:

By design, the final draft of the Model Rules is an integrated document, both in organization and substance. It is also a document that addresses a national audience, the constituencies of the American Bar Association and the profession at large. And it is a "model" document, for its adoption by the ABA is an invitation to bar-governing bodies to do the same. While national uniformity is in many respects a most desirable goal, it has never been achieved in the field of professional regulation. In coming to a consensus on the Model Rules, then, it is not inappropriate to note that local variation in implementation will surely occur. But considerations which may prompt such local variation should not deter the Association from adopting Model Rules that speak from a national perspective.

Id. at 11.

65. Compare *Final Draft*, *supra* note 9, at Rule 1.6 with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 & DR 7-101 (1980).

66. Compare *Final Draft*, *supra* note 9, at Rule 3.3 with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980).

67. Compare *Final Draft*, *supra* note 9, at Rule 1.5 with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 & DR 2-107 (1980).

68. Compare *Final Draft*, *supra* note 9, at Rule 1.13 with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107, EC 5-18, & EC 5-24 (1980).

69. Compare *Final Draft*, *supra* note 9, at Rules 7.1-7.5 with MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1980).

70. Compare *Final Draft*, *supra* note 9, at Rules 1.7-1.9 with MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980).

of these areas will be given only passing review, since in-depth analyses are available in the commentary to the Rules and in articles by special interest groups.⁷¹

A unifying element of the substantive rule changes from the Code is that they all focus primarily on aspects of information dissemination. The emphasis upon disclosure of information is most obvious in the areas of advertising, solicitation, and fee agreements. Support for information availability is also reflected by the treatment of conflicts, confidentiality, and public service in the Rules.

The Rules place no significant limitation upon the format or media an attorney might choose in advertising his or her services. The continued prohibition against advertising specialties is an exception.⁷² Otherwise, an attorney may use broadcast media and even direct mass mailings to advertise his or her services.⁷³ The dignity of a particular ad is left primarily to the public, not to professional scrutiny, as long as the ad is not deceptive or misleading.⁷⁴ The Rules no longer list the acceptable means of advertising that were present in the Code. Instead, the Rules use directives against misleading the public.⁷⁵ Thus, the rule on advertising is directive rather than regulative.

The Rules permit an attorney to solicit prospective clients through personal contact under charitable or political auspices that primarily promote availability of legal services.⁷⁶ An attorney may never solicit either directly or by mail where solicitation is likely to harass, coerce, or otherwise detrimentally disturb the recipient of the communication.⁷⁷ The Rules' position is very similar to that adopted by the Minnesota Supreme Court in its most recent decision on solicitation.⁷⁸

With respect to confidentiality, the Rules have been criticized as jeopardizing client secrets divulged to the attorney. The criticism is based

71. See *Final Draft*, *supra* note 9 (Rules, plus commentary and Code comparisons); ABA MATERIALS ON MODEL RULES OF PROFESSIONAL CONDUCT (1982) (Compendium of suggestions, comments, and criticisms of the Model Rules submitted to the Kutak Committee on Evaluation of Professional Standards).

72. See Andrews, *The Model Rules and Advertising*, 68 A.B.A. J. 808 (1982) (up-to-date summary of attorney advertising in the context of the Model Rules, which reflect current trends in a more wide-open advertising market for legal services). The Minnesota Bar Association is considering removing all restrictions against advertising specialties except making false or misleading statements. See Minn. B. Ass'n, *Report of the Ad Hoc Committee on the ABA Model Rules of Professional Conduct*, 41 BENCH & B. MINN., Apr. 1984, at 31, 34 [hereinafter cited as *Minn. Ad Hoc Comm. Report*].

73. See Andrews, *supra* note 72; see also *Final Draft*, *supra* note 9, at Rule 7.3.

74. See *Final Draft*, *supra* note 9, at Rule 7.3.

75. Compare *id.* with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1980).

76. See *Final Draft*, *supra* note 9, at Rule 7.3(a).

77. See *id.* at Rule 7.3(b).

78. See *In re Appert*, 315 N.W.2d 204 (Minn. 1981); see also *Minn. Ad Hoc Comm. Report*, *supra* note 72, at 35, 56.

on misconceptions about the elimination of the Code's distinction between "secrets" and "confidences."⁷⁹ The Rules actually expand client protection by making secrets and confidences, and all information related to the relationship with the client, confidential.⁸⁰ The approach of the Rules is more protective of secrets than that of the Code.⁸¹

The Rules encourage disclosure of information in the courtroom and of fee arrangements. Disclosure of fee arrangements in writing early in the attorney-client relationship is clearly to the client's advantage. Fee disclosure eliminates many possibilities for disputes and ethical complaints.⁸²

A disclosure bias for courtroom candor can compete with the Rules' own protections against disclosure of client confidences,⁸³ but candor is only required when the client is using an attorney to deceive the court. For example, the requirements in the Rules for courtroom candor put the client at risk when the client attempts to criminally manipulate either the court or his attorney with fabricated testimony.⁸⁴ The Rules are more methodical than the Code because all perjury is subject to a strict analytical balancing test aimed at preventing courtroom crime and fraud.⁸⁵ Disclosure is required to prevent a fraud or to remedy a fraud in which the attorney is being used as the client's active tool. Disclosure is

79. See *Final Draft*, *supra* note 9. The Final Draft states:

As to confidentiality, the starting point in the Model Rules is expansion of the scope of the general obligation. The Model Rules do not use the existing code classification of "confidences" and "secrets" and the related distinction regarding information "embarrassing to the client." The Model Rules assume that clients initially expect that *all* information relating to the representation will be protected.

Id. at 3 (emphasis original).

80. See Kutak, *supra* note 30 (compares the position of the Model Rules to attorney-client privilege and other related areas of the substantive law).

81. Compare *Final Draft*, *supra* note 9, at Rule 1.6 with MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980). See also *Summary and Analysis, Annual Meeting of the American Bar Association*, 52 U.S.L.W. 2077 (Aug. 9, 1983) (American College of Trial Lawyers won concessions to changes on confidentiality issue at mid-year convention).

82. See Hoover, *Many Ethics Complaints are Completely Avoidable*, 38 BENCH & B. MINN., Feb. 1982, at 21 (most complaints about lawyer ethics originate over fee disputes).

83. See *Final Draft*, *supra* note 9, at Rules 1.15 & 3.3. The final position on confidentiality requires slightly less disclosure, or at least states a slightly different perspective on disclosure which gives the courtroom advocate more discretion.

84. See *Final Draft*, *supra* note 9, at Rule 3.3 & comment.

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Id. at 21.

85. See *id.* at Code Comparison. "Rule 3.3(c) confers discretion on the lawyer to refuse to offer evidence that he 'reasonably believes' is false. This gives the lawyer more latitude than DR 7-102(A) (4), which prohibits the lawyer from offering evidence the lawyer 'knows' is false." *Id.*; see also *id.* at Rule 1.1 (Terminology). "[R]easonably be-

discretionary, not mandatory, when the attorney has in retrospect passively and without knowledge assisted in the client's misconduct or mis-guided activity.⁸⁶

Finally the Rules increase the emphasis upon strict professional independence in the areas of corporate representation and conflicts of interest. The Rules, nevertheless, clarify the recognized range of permitted legal practice. For example, a lawyer may work for a non-lawyer in the form of a corporate entity, and owe an obligation to the interest of that entity.⁸⁷ While acting in a representative capacity, however, in courts as well as public forums the lawyer is held to the standards of his profession, not to the standards of his non-lawyer peers or constituents.⁸⁸

These principles are also asserted in areas of conflicts of interest. In contrast to the Code, the Rules do not permit continued representation of a client where the client recognizes and sanctions an adverse conflict of interest by the attorney.⁸⁹ The representation may continue, however, regardless of what appears to be an impropriety under Canon 9, if the apparent conflict is neither objectively nor subjectively detrimental to the client.⁹⁰ Disclosure to the client of real or potential conflicts is still required. The lawyer must discontinue representation, however, if he recognizes his personal inadequacy, despite client approval. Representation may continue only if more harm to the client would result by not continuing representation.⁹¹

V. CONCLUSION

The changes made by the Rules formalize what has been stated differently or not stated at all in the Code. The Rules do not substantially change the approaches to problem solving in legal ethics. The lack of substantive changes is evident in that there are more similarities between

lieves' when used in reference to a lawyer denotes that the lawyer believes that matter in question and that the circumstances are such that the belief is reasonable." *Id.* at 22.

86. See *Final Draft*, *supra* note 9, at Rule 3.4; Kutak, *supra* note 30.

87. See *Final Draft*, *supra* note 9, at Rule 1.13; Kutak, *supra* note 30.

88. See Evans, *The Organization as Client*, 68 A.B.A. J. 814, 814-15 (1982); see also *Final Draft*, *supra* note 9, at Rule 3.9.

89. See Hovdesven, *The Model Rules: Conflict of Interest*, 68 A.B.A. J. 812, 812-14 (1982).

90. See *Final Draft*, *supra* note 9, at Rules 1.7-1.9; see also Krammer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243 (1980) (vagueness problems discussed with the "Appearance of Impropriety").

91. See Hovdesven, *supra* note 89. Hovdesven states:

There are two significant differences in this provision [Rule 1.7] from the present code. First, client consent will not permit a lawyer to accept or continue the representation when an actual conflict will adversely affect the representation. . . . Second, in no event may the lawyer accept or continue the representation unless the lawyer reasonably believes that the client's best interests will not be adversely affected.

Id. at 812.

the Rules and the Code than differences. This Note has highlighted the background attitude, structure, and process in the changes being made by the new Rules. Only as the states adopt the Rules and begin to apply them in concrete situations will the legal profession and the public be able to realize the real import of the new Rules.